

**LAW ON PROTECTION OF THE RIGHT TO TRIAL WITHIN REASONABLE TIME:
ENVIRONMENT FOR CRIMINAL SANCTION THAT
SERVES ITS PURPOSE AND COST-SAVING**

December 15, 2016

Timely completion of criminal proceedings *inter alia* has an important role in reaching the minimum distance in time from the commission of the crime to the imposition of criminal sanctions. Its importance is reflected at the level of reduction of the negative effects or deprivations that the defendant is exposed to in the course of criminal proceedings that caused the proceeding itself has the character of the criminal sanction, as well as in achieving the ideal balance between severity and all circumstances of the offense and the characteristics of the offender, on the one hand, and the type and extent of criminal sanction which it is imposed. Increased time distance necessarily affect the strength of the restorative effects of criminal sanctions and reducing it to mere retribution. The obligation of each state is to undertake a comprehensive and timely measures in the reform of procedural legislation as well as in organization of judiciary, in order to create the preconditions for the realization of the right to trial within a reasonable time. In this sense realization assumes both: prevention of violation of this right as well as corrective mechanisms in the event that a breach does occur. The Republic of Serbia has in recent years made significant steps by introducing a new system of protection of the right to trial within a reasonable time based on the address to courts of general jurisdiction. The most important step on this road, was the adoption of the Law on the Protection of the right to trial within a reasonable time to be applied as from the first of January 2016. Despite some controversial provisions, this law represents a major step forward, but there is no doubt that only its implementation will demonstrate real achievements.

Key words: criminal proceedings, reasonable time, criminal sanction, efficiency

1. Importance of criminal proceedings' efficiency

Timely completion of criminal proceedings, as an element of the right to a fair trial guaranteed by Article 6 of the European Convention carries with it multiple benefits. Their range, starting from improving legal predictability as a precondition for the creation of a favorable business environment and economic growth pursued by each country, through the saving of human and material resources invested in the criminal proceedings, to the reaching the minimum distance in time from the commission of the crime to the imposition of criminal sanctions. *Justice delayed, justice denied* as the commonly used maxima couldn't be truer, especially when it comes to criminal proceedings. In literature usually could be found incomplete definitions of the term "efficiency". The most repeated mistake related to definition of this term is connected with wrong understanding of the relation between terms "speedy trial" and "efficiency" caused by tendency

of some authors to read them as the synonyms instead to see “speedy trial” as the important element of the “efficiency” accompanied with legality, protection of human rights of the criminal proceeding subject as well as cost saving principle. Only criminal proceeding conducted in line with law; within reasonable time; respecting the human rights; with rationale usage of resources (human as well as material).

Understood on this way efficiency of criminal proceedings has a great importance on various levels. On global level, efficiency is the one of the most important rule of law instruments. Accompanied with consistent jurisprudence it becomes milestone of legal predictability. But if we put it in the context of realization of criminal sanctions’ purpose, it has the role of precondition for timely determination of proper sanction in balance with nature and severity of crime as well as offender’s characteristics.

2. Relation between crime and punishment in the context of speedy trial

The importance of speed proceedings and an immediate punishment has been recognized three centuries ago by Cesare Beccaria who stated that the more immediately, after the commission of a crime, a punishment is inflicted, the more just and useful it will be. “It will be more just, because it spares the criminal the cruel and superfluous torment of uncertainty, which increases in proportion to the strength of his imagination and the sense of his weakness.” He analyzed nature of imprisonment from the angle of privation of liberty, and concluded that being a punishment, ought to be inflicted before condemnation, but for as short a time as possible. Imprisonments, being only the means of securing the person of the accused, until he be tried, condemned or acquitted, ought not only to be of short duration, but attended with as little severity as possible. The time should be determined by the necessary preparation for the trial, and the trial should be conducted with all possible expedition. He paid his attention also on the role/influence of magistrates on trial length and asked: “Can there be a more cruel contrast than that between the indolence of a judge, and the painful anxiety of the accused; the comforts and pleasures of an insensible magistrate, and the filth and misery of the prisoner?” The core of his ideas lies in establishing the optimal balance between crime and punishment. “The degree of the punishment, and the consequences of a crime, ought to be so contrived, as to have the greatest possible effect on others, with the least possible pain to the delinquent. An immediate punishment is more useful; because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of Crime and Punishment: so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect. Delaying the punishment serves only to separate these two ideas; and thus affects the minds of the spectators rather as being a terrible sight than the necessary consequence of a crime; the horror of which should contribute to heighten the idea of the punishment.” (Beccaria, 1764: 29-30)

There is no doubt that the legislator expects of every citizen to handle loads that arise as a result of the criminal proceedings conducted effectively - even in the event that the process takes too

long. However, it is equally unacceptable to take into account on the same way loads which suffers the defendant in a procedure that is completed within a reasonable time as in one which is unreasonably long, thereby causing the violation of the principle of the rule of law.

This view is a result of the theoretical approach which assumes that realization of the criminal proceedings has in its nature character similar to criminal sanction, that caused the defendant "has been already punished" and that the extended duration of the proceedings only further emphasizes this feature of his. The intensity of this character of the procedure is not always the same and depends on the severity of the offense for which the defendant is charged, the expected legal consequences, and finally, whether for the criminal offense charged against a citizen who had not conducted any criminal proceedings. (Roxin, 2011: 65)

It is necessary to underline importance of speedy trial when it comes to juvenile offenders. Delays in juvenile justice may be uniquely harmful, having in mind that adolescents are socially, emotionally, and cognitively different from adults. Particularly during stressful circumstances, adolescents exhibit a sense of "futurelessness" in evaluating the possible risks associated with personal behavior and choices. Negative consequences that might be enforced sometime in the future do not exert much influence over a juvenile's behavior. A slow court process also reduces the ability of the juvenile justice system to intervene in the budding careers of young, repeat offenders. (Butts & Sanborn, 1999:16-24)

3. Mechanisms of protection before the courts of general jurisdiction

Bearing in mind length of proceedings before the Constitutional Court as well as increasing number of constitutional appeals, effectiveness of the constitutional appeals became reason for concerns. Considering recent ECtHR practice as well as good comparative practice, Republic of Serbia amended its normative framework in 2013 on the way that assumes transition of the competences for protection of the right to trial within reasonable time to courts of general jurisdiction.¹

The amended Law on organization of courts ruled court jurisdiction in cases related to protection of the right to trial within a reasonable timeframe (Article 6.1. of the ECHR) on the new way. The relevant provisions of this law were Article 8a-8c and stipulated that "a party to the court proceedings who believes that his/her right to a trial within a reasonable time has been violated, may directly apply request for the protection of the right to trial within a reasonable time to the immediate higher court." Compensation for violation of the right to trial within a reasonable time was also to be required within the request from paragraph 1 of that Article. Supreme Court of Cassation had the jurisdiction to decide on request if the request relates to a process which is

¹ Law on organization of courts („Official Gazette”, No. 116/08, 104/09, 101/10, 31/11 – oth. law, 78/11 – oth. law, 101/11 and 101/13)

pending before the Commercial Court of Appeals, Misdemeanor appeals court or Administrative court. The process of deciding on the request referred to in paragraph 1 of Article 8a was urgent. In accordance with Article 8b, If the immediate higher court finds that the applicant's request has merit, it could set an appropriate compensation for the violation of the right to trial within a reasonable time and determine the period in which the lower court shall conclude the proceedings in which the right to trial within a reasonable time has been violated.

The fee referred to in paragraph 1 of the Article 8b should be paid from the budget of the Republic of Serbia earmarked for courts within three months from the date of the filing request for payment. An appeal to the Supreme Court of Cassation was allowed within 15 days against the decision on the request for the protection of the right to trial within a reasonable time.

The procedure for the protection of the right to trial within a reasonable time and compensation for the violation of the right to trial within a reasonable time was regulated in accordance with the provisions of the law governing non-contentious procedure (Article 8c).

As the several serious problems in the process of implementation of those legal provisions had been identified, Ministry of Justice decided to establish working group for drafting separate Law on protection of right to trial within a reasonable time. The main idea is to establish detailed, precise and effective legal framework. The working group decided to base its work on models of legal protection that already exist in Slovenia, Croatia and Montenegro. The milestone of these models is combination of preventive/accelerating and compensatory legal remedies those have been evaluated as an effective by the ECtHR.

4. Law on protection of the right to trial within reasonable time

The initial impression is that the new Law adopted by Government of the Republic of Serbia in May 2015 connecting preventive and compensatory remedies. Use of preventive remedies is set as a precondition to refer on compensatory one. That's the way to motivate parties in proceedings to act proactively. That approach is in line with the Venice Commission opinion from March 2013. In Paragraph 90 commission stated that the "the starting point for a regulation should be to view financial compensation as one of several remedies. Financial compensation must thus not be the only remedy or the remedy considered first. It all depends on the circumstances of the specific case. The payment of an "indemnity" may not always be necessary and/or in some cases should not be the only available remedy. This means that, as far as possible, violations should primarily be redressed or remedied within the framework of the process in which they arise. For this to be possible, courts and administrative authorities must be aware of all the issues that concern the

European Convention on Human Rights in both procedural and material terms. At the same time, individuals cannot remain passive in their contacts with courts and authorities.”²

In the same document the Venice Commission criticized concept of the abovementioned Articles 8a – 8c that introduced a procedure where a request for and a decision on damages are interlinked with the concept of the acceleration of the case handling, emphasizing that decision on damages will serve as a sort of penalty or fine, forcing the judge to deal with the case. Commission further concluded that such a mechanism could put him/her under pressure, which in turn could endanger the principle of a fair trial, especially in the context of state liability followed by the liability of the judge under certain conditions set out in Article 6 of the Law on judges.

Having in mind abovementioned concerns regarding purpose of the new law, it’s a bit confusing definition given in the Article 1 that stipulates that the purpose of this Law is to provide judicial protection of the right to trial in reasonable time as the way to prevent violation of the right. It seems such a definition doesn’t reflect real intention of the legislator to promote preventive mechanism.

Judicial protection of the right to trial in reasonable time also includes the investigation conducted by the prosecution in criminal proceedings. This provision is in line with Venice Commission opinion CDL(2006)021-e, in which was underlined that the length of criminal proceedings also includes the criminal investigation as the applicability of the article 6 begins the moment when the criminal charge is notified to the person concerned. Furthermore, Venice Commission recommended considering the existence of a remedy for speeding up the procedure in this stage, by guaranteeing a petition right before the prosecutor in charge with the supervision of the criminal investigation, or, in case the criminal investigation is conducted by the prosecutor, before his/her hierarchic superior.³ The ECtHR addressed the same issue on same way judging in case *Djangozov v. Bulgaria*.⁴

When it comes to subjects of criminal proceedings entitled to request protection in accordance with the new law, the Law on protection of the right to trial within reasonable time stipulates in Article 2 that the right to trial in reasonable time applies to any party in any judicial proceedings, the party according to the law regulating non-contentious proceedings, and the victim in criminal proceedings, the private prosecutor and the injured party as prosecutor in cases where they have claimed for damages (hereinafter: the party). The public prosecutor as party in criminal proceedings is not entitled to the protection of the right to trial in reasonable time. It is important to notice that authority to request protection of the right for private prosecutor and injured party is preconditioned by claim for damage.

² European Commission for Democracy through Law (Venice Commission), CDL-AD (2013)05 *Opinion on Draft amendments to Laws on the Judiciary of Serbia*, Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013);

³ European Commission for Democracy through Law (Venice Commission), Comments on National Remedies in Respect of Excessive Length of Proceedings CDL(2006)021-e, Strasbourg, 10 March 2006, par. 3.

⁴ *Djangozov v. Bulgaria*, No. 45950/99, decision from October 8th 2004.

That could be problematic bearing in mind that the injured party has option to request material satisfaction in criminal as well as in civil proceeding, but usual practice of criminal courts is not to decide on claim for damage. In parallel, civil courts have practice to wait on criminal court decision to decide on claim for damage. Having in mind this setup as well as new Law's provision that connecting *dies a quo* for injured party to the moment of claim's submission that reduces real length of proceeding, it looks important to establish obligation for judges and public prosecutors to inform injured party about influence of the moment of claim's submission on right to request protection in accordance to Law on protection of the right to trial within reasonable time.

According to Article 3 legal remedies protecting the right to trial within reasonable time include:

- 1) complaint in order to accelerate proceedings (hereinafter: complaint);
- 2) appeal;
- 3) request for just satisfaction.

The good choice of the legislator is to abolish party of paying court tax in the procedure under legal remedies protecting the right to trial in reasonable time as well as to rule these procedures as urgent with and have priority in decision-making.

The complaint and the appeal may be filed only while the case is pending. The decision of the complaint or the appeal has procedural nature and must not influence the factual or legal issues which are the subject of the proceedings or of the investigation. The decision rejecting or granting the complaint or the appeal shall be justified in detail. (Article 5)

Definition of the criteria for assessment of duration of trial in reasonable time (Article 4) is based on criteria from the ECtHR practice. In adjudicating on legal remedies all circumstances of the case shall be taken into consideration, primarily the complexity of factual and legal issues, the overall duration of proceedings and the conduct of the court, the public prosecutor or other state authority, the nature and type of the issue of the case or the investigation and the significance of the issue of the case or of the investigation for the party, the conduct of parties during the proceedings especially their respect of procedural rights and obligations, legally prescribed deadlines for scheduling of hearings and the main hearing and the making of decision.

The procedure for the protection of the right to trial in reasonable time shall commence by filing the complaint. The party shall file a complaint to the court in charge of the procedure or court before which the procedure is held if the party deems that the right to trial in reasonable time has been violated by the prosecutor. The procedure under the complaint shall be held by the president of the court deciding on the complaint. The president of the court may, through the annual schedule of tasks, appoint one or more judges who shall, besides himself/herself, be ruling on complaints. From our point of view it seems that better solution will be to connect that issue with a size of court/total number of judges in court. The president of the court shall be obliged to give an opportunity to the judge or the public prosecutor to state their position regarding the complaint

except in cases when the complaint is obviously not founded, and the report by the judge or the public prosecutor shall not be submitted to the party. The president of the court shall be obliged to make a decision regarding the complaint within two months of its receipt. In accordance with the Article 9 the president of the court shall request the judge or the president of the panel of judges, or the public prosecutor in charge of the investigation, to submit a report to the president of the court within 15 days. The president of the court may allow a shorter period for the submission of the report if the complaint pertains to a procedure for which a special law requires urgent action.

The report shall include a statement regarding how the procedure is developing over time and a proposed deadline within which the procedure can be finalized. The president of the court may request the case file to be provided if, with respect to the content of the complaint, he/she finds that it is necessary to inspect the case file.

Applying criteria for assessment of trial in reasonable time (Article 4) the president of the court shall study the report and rule either reject or grant the complaint and shall determine the violation of the right to trial in reasonable time.

Article 11 stipulates that in the ruling granting the complaint the president of the court shall point for the judge to the failures in developing the case in terms of time and in that respect shall order the judge to undertake measures which shall be effective in accelerating the proceedings. In the ruling granting the complaint the president of the court shall determine a deadline within which the judge shall undertake measures, and this deadline shall not be less than 15 days nor more than four months, and shall also determine an appropriate deadline within which the judge shall report back on measures undertaken.

The president of the court may, depending on the circumstances, and especially when the proceedings is urgent, determine priorities in decision-making, and may also take away the case from the judge and assign it to another judge if the violation of the right to trial in reasonable time resulted from too great a workload of the judge or a longer absence of the judge.

The similar procedure goes for the situations when the right to trial within reasonable time is under concern during the investigation coordinated by public prosecutor. In that case the directly superior public prosecutor is entitled to determine measures that should be taken.

Article 13 regulates procedure for repeated complain that could additionally prolong real effects of this remedy.

The second preventive remedy prescribed by Law is Appeal to the president of the court. President of the directly superior court is entitled for making decision on this remedy in procedure similar to procedure after filling complaint by the law regulating non-contentious procedure. The president of the directly superior court shall make a ruling on the appeal within 30 days of the receipt thereof.

The purpose of appeal is to be corrective in various situations when complain doesn't result in speeding up procedure. The conditions for use this remedy is too vague and leave the possibility for almost all parties that already used complain to try the same using appeal. Having that in mind this remedy seems to be rather mechanism to additionally prolong procedure not to speed it up. That especially true if we consider possibility of repeating the complaint. It seems more logical choice of legislator to avoid repeated complain and allow appeal after the first unsuccessful complaint.

The Law further regulate conditions, modalities and procedures for realization of the right on just satisfaction. The types of just satisfaction are as follows:

- 1) the right to payment of pecuniary compensation for non-material damages caused to the party through the violation of the right to trial in reasonable time,
- 2) the right to publication of a written statement of the State Attorney (hereinafter: the State Attorney) stating that the party's right to trial in reasonable time had been violated,
- 3) the right to publication of the judgement determining that the party's right to trial in reasonable time had been violated.

The responsibility of the Republic of Serbia for non-material damages caused by the violation of the right to trial in reasonable time is objective obligation. In deciding on just satisfaction, the State Attorney and courts are bound by the rulings of the presidents of the courts establishing the violation of the right of the party to trial in reasonable time.

In accordance with Article 24 the party is allowed to propose settlement with State Attorney. In the request for settlement the party shall state if he/she is requesting payment of pecuniary compensation or publication of the written statement determining the violation of the right to trial in reasonable time, or both. The State Attorney shall attempt to reach an agreement with the party within two months of the receipt of the request for settlement, and if such settlement is reached, the State Attorney shall sign with the party the out-of-court settlement which shall be deemed to represent an enforceable document.

The State Attorney shall be obliged within the procedure for settlement to stay within the amounts of pecuniary compensation provided for in Law (300-3000e).

Decision of the legislator to define strong limits (maximum and minimum) for pecuniary compensation could be criticized despite the fact that ECtHR usually has the similar amounts in its practice. In many European countries (for instance, Lithuania, Poland, Slovakia and UK), there is no such maximum. It seems to be in contradiction with the principle of *restitutio in integrum*; the competent authorities should decide the amount based on the circumstances of the case. There aren't clear arguments in favor of such a limitations, having in mind variety of cases, as well as the approach of the ECtHR that effectiveness of legal remedies on national level doesn't depend on average amounts of pecuniary compensation.

Article 26 provides quite unclear conditions in which the Public Attorney may choose publication of statement instead of payment of satisfaction.

Beside settlement with the Public Attorney, the party may file a claim for compensation of material damage caused by the violation of the right to trial in reasonable time against the Republic of Serbia, within one year of the time when the party acquired the right to just satisfaction. The state authorities, the authorities of the autonomous province, municipalities, towns and the City of Belgrade and public services as parties in the court proceedings are not entitled to just material damages and compensation for material damage.

Appeals cannot be filed while attempts for settlement with the State Attorney are underway, nor if such settlement has been reached.

Irrespective of the type and the amount of the claim, the proceedings before the court shall apply *mutatis mutandis* the provisions regarding small claims from the law regulating litigation.

The basic court in the territory in which the applicant has domicile, residence or seat shall be the only court having territorial jurisdiction to adjudicate.

In cases when the applicant does not have domicile, residence or seat in the Republic of Serbia, the court with territorial jurisdiction shall be the basic court with the seat in the seat of the court which determined the violation of the right to trial in reasonable time.

Similar to the procedure before the State Attorney, the court may – after an assessment whether just satisfaction for non-material damage is possible to achieve by just publishing the judgement determining violation of the right to trial in reasonable time – decide, instead of adjudicating an amount of compensation, to publish the judgement determining the violation of party's right.

In case of more severe violation of the right to trial in reasonable time the court may, at the request of the party, publish the judgement determining the violation and also adjudicate a monetary amount of compensation.

The Law regulates relation between mechanisms according to Articles 8a-8c and newly established one by Law on protection of the right to trial within reasonable time.

Article 36 of the Law on the protection of the right to trial within a reasonable time provided that the date of entry into force of the Act, the provisions of Art. 8a - 8v Law on organization of courts and Article 82, paragraph 2 of the Law on the Constitutional Court shall cease to be valid.⁵ In parallel, Article 34 stipulates that procedures that has already started in accordance with Art. 8a - 8v Law on organization of courts shall be continued following the same procedure. In other cases, proceedings for the protection of the right to trial in reasonable time shall be conducted in accordance with the provisions of the new Law.

⁵ Law on Constitutional Court („Official Gazette”, No. 109/07, 99/11 and 18/13 – CC)

The Law (Article 38) also regulate possibility of settlement for the persons, who have submitted an application to the European Court of Human Rights because they deem that their right to a trial within reasonable time had been violated, on which a ruling on admissibility or merits has not been handed down, may, within six months as of coming into force of this Law, submit to the State Attorney's Office the motion for settlement on a pecuniary compensation, specifying the date of submittal of the application to the European Court of Human Rights and the number of the application in the motion for settlement. The closed settlements shall be deemed to represent an enforceable document. Instead of the motion for settlement or after giving up the attempt for settlement, the applicant may within one year of the coming of this law into effect apply for pecuniary compensation against the Republic of Serbia to the court having jurisdiction under this law. The appeal shall not be admissible if the party and the State Attorney close a settlement.

5. Conclusions

Having in mind all abovementioned there is the real concern does the new Law on protection of the right to trial within reasonable time in existing form serves as an effective mechanism for speeding up proceedings and building environment for immediate and adequate sentencing in the context of restorative justice as well as for the sufficient savings? Beside the fact that the final opinion on the Law's effectiveness is up to ECtHR, from our angle it seems the answer is negative. Despite the initial idea to promote preventive function of the Law, its concrete provisions do not provide strong base for expectations that criminal proceeding could be speeded up in short time. Procedure prescribed for filling complaint, possibility of its repeating, as well as to vague conditions for filling appeal, combined with too long deadlines and overburdening of general jurisdiction courts doesn't seem as a proper way to ensure timely sentencing.

The same goes when it comes to savings. Maximal amount of compensation is in line with earlier practice in this area. Moreover, the effect could be the opposite, bearing in mind the additional burden which the courts may be exposed deciding on remedies provided for in the law on the protection of the right to trial within a reasonable time.

Having all abovementioned in mind, it seems that the key role in realization of preventive function of the Law and maximal use of its capacity regarding speeding up proceedings will lay in hands of presidents of the courts or judges designated to handle cases relating to violation of the right to trial within a reasonable time. Their role will be reflected in the introduction of a clear and objective analysis of the course of the work of acting judges in a way which implies that interest for the timely completion of the procedure prevails over the collegial relationships. This approach would have significant results not only in terms of specific methods of acceleration, but would also act preventively for all judges in a particular court. In parallel, it would decrease needs for conducting disciplinary proceedings against judges for untimely conducting procedure.

The ultimate benefit of this practice could be expected in the five-year period through the visible shortening of the average duration of criminal proceedings; reduced number of complaints to the

European Court of Human Rights for violations of the right to trial within a reasonable time; but also in rationalization the use of resources.

Increased certainty of timely punishment could have significant influence on potential perpetrators of crime, while the reduced time lag between the execution of the offense and the imposition of criminal sanctions raises the expected impact of such sanctions on the offender and supported its reintegration into society.

However, it is important to note that the effective implementation of this law, in addition to professional conduct of the court presidents as the most important subjects in the segment which refers to the preventive effect of the law, must be accompanied by its constant improvement but also the parallel work on improvement of procedural and judicial legislation and bylaws that have important influence on efficiency.

6. Sources

- Becarria, C. (1764): *An Essay on Crime and Punishment*, The Federalist Papers Project, pp. 29-30.
- Butts, J. & Sanborn J. (1999): Is the juvenile justice just too slow, *Judicature*, Vol. 83, No. 1, pp. 16-24.
- European Commission for Democracy through Law (Venice Commission), CDL-AD (2013)05 *Opinion on Draft amendments to Laws on the Judiciary of Serbia*, Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013);
- European Commission for Democracy through Law (Venice Commission), Comments on National Remedies in Respect of Excessive Length of Proceedings CDL(2006)021-e, Strasbourg, 10 March 2006, par. 3.
- Law on Constitutional Court („Official Gazette”, No. 109/07, 99/11 and 18/13 – CC)
- Law on organization of courts („Official Gazette”, No. 116/08, 104/09, 101/10, 31/11 – oth. law, 78/11 – oth. law, 101/11 and 101/13)
- Law on protection of the right to trial within reasonable time („Official Gazette”, No. 40/15)
- Roxin, I. (2011): Development of the court practice regarding unreasonable length of criminal proceedings considering *In dubio pro libertate* principle, *Branič*, No. 1-2, p. 65.